anguish. And in a separate suit the daughter was compensated for her distress of mind because the sendee failed to meet her at the depot. This case should be helpful in arriving at the correct theory of the principal case. In the instant case a tort was undoubtedly committed. To say that the father must sue in such case whether or not he has suffered mental anguish, when by statute the wife can sue alone for her own injuries, seems very close to admitting a wrong and denying a remedy. Because the father is the next of kin under the statute of distributions, and hence on him devolves the sacred trust of disposing of the corpse in decent burial, argues but weakly for the further assumption that he is the sole sufferer from the mutilation of his dead child's body. Inasmuch as mental anguish alone gives rise to an action for damages in the forum, it is respectfully submitted that the decision in the instant case is not entirely free from doubt.

RIGHT OF A STATE TO PREVENT A FOREIGN CORPORATION FROM REMOVING CAUSES TO THE FEDERAL COURTS.—By the Constitution of the United States, jurisdiction over "all cases in law and equity —between citizens of different States" is vested in the Federal Courts.[1] This wise provision removes cases where the litigants are of diverse citizenship from the reach of local prejudice. But in those cases which involve foreign corporations numerous efforts have been made to evade this Constitutional provision. In many instances States have sought to force foreign corporations doing business within their borders to seek legal redress only in State courts.[2] Such legislation raises a legal question which has given the courts considerable difficulty.

It is an elementary principle of our law that a State can not in any manner "destroy, abridge, limit or render inefficacious" any right guaranteed by the Constitution of the United States or Federal laws enacted pursuant thereto. Also the doctrine has often been laid down that a "State has the absolute power to prevent foreign corporations not engaged in interstate commerce from doing business therein. It may exclude them entirely or it may permit them to come in under any terms it sees proper to prescribe." [3] Now it is evident that when a State statute requires a foreign corporation as a prerequisite to doing business therein to agree not to proceed against any of its citizens in the Federal courts, nor remove any suits brought by any citizen in the State courts to the Federal

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[1] Art. 3, § 2, par. 1.

[2] Home Ins. Co. *v.* Morse, 20 Wall. 445; Barron *v.* Burnside, 121 U. S. 186.

[3] Paul *v.* Virginia, 8 Wall. 168; Horn Silver Mining Co. *v.* New York, 143 U. S. 305. In the latter case the court said: "This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be at rest." State ex rel. Kimberlite, etc., Co. *v.* Hodges (Ark.), 169 S. W. 942.

courts, its validity depends on which one of these two principles predominates. The right of a citizen of one State to remove a suit brought against it by a citizen of another State in the State courts to the Federal courts is certainly a Federal right, and to what extent a State can tamper with this right of a foreign corporation is a nice question.

In the early case of *Home Ins. Co.* v. *Morse,*[4] the State statute required all foreign corporations to agree in advance not to remove any case to the Federal courts before they could obtain a license to do business. It was held unconstitutional because it required the foreign corporation to absolutely forego a Federal right. In a later case [5] a distinction was recognized when no such agreement was required from the corporation but it was provided that if a foreign corporation did remove a case to the Federal courts its license should be revoked. Such a statute was said to be valid. But the precise point was not before the court. The court made the point that this kind of statute did not deprive the foreign corporation of any Federal right but merely gave it the option to either refrain from the exercise of this right or to cease to do business in the State.

This is a rather fine distinction but it is a very material one. The difference in effort between an absolute prohibition of the exercise of the right of removal and a provision that a corporation may remove a suit if it desires, but if it does so remove, its license will be revoked, is clearly distinguishable. The case might arise when this difference would be of great importance. If a foreign corporation has the option to either refrain from the exercise of the right of removal or to cease to do business in a State, it unquestionably has the right to resort to the Federal courts once. Even if it lost its license thereby the right to resort to the Federal courts might be of much greater value to it. But if a statute containing a prohibition were valid the foreign corporation would be from the moment of its entry forever barred from the Federal courts.

The case of *Barron* v. *Burnside,*[6] however, refused to recognize this distinction. Although the statute was clearly not a prohibition, the court held that it amounted substantially to the same thing.[7] But in *Security Mutual Ins. Co.* v. *Prewitt,*[8] the distinction was definitely recognized and the right of a State to enact a statute revoking the license of a foreign corporation which should remove a case to the Federal court was clearly affirmed.

This right applies only to foreign corporations doing purely an

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[4] *Supra.*

[5] Doyle *v.* Continental Ins. Co., 94 U. S. 535.

[6] *Supra.*

[7] The court said: "It is apparent that the entire purpose of this statute is to deprive the foreign corporation * * * of the right conferred upon it by the Constitution and the laws of the United States to remove a suit from the State court into the Federal court either on the ground of diversity of citizenship or of local prejudice."

[8] 202 U. S. 246.

intrastate business.[9] Any attempt by a State to interfere with interstate commerce is void.[10] But where interstate commerce is not involved and the statute in controversy does not contain a prohibition the Prewitt case is the leading case.[11]

In the recent case of *Western Union Tel. Co.* v. *Frear,* 216 Fed. 199, a foreign corporation entered a State under the authority of a statute which provided that on the removal of a suit to the Federal courts its license to do business in that State would be revoked. The court, on the authority of *Barron* v. *Burnside,*[12] held the statute void as constituting in effect a prohibition. Inasmuch as this holding is contrary to the Prewitt case, the decision would seem erroneous.

LIQUIDATED DAMAGES AND PENALTIES.—Since 8 & 9 William III courts of law have applied the doctrine of equity in the construction of contracts containing penalties and forfeitures. On assuring themselves that the stipulations under consideration are penalties they have steadfastly refused to enforce them. Although the courts will not enforce a penalty, *eo nomine,* under certain rules to be discussed later they will enforce a stipulation for liquidated damages which, in reality, is sometimes hardly distinguishable from a penalty. The entire burden of judicial inquiry has been, therefore, centered upon whether the stipulations under consideration are penalties or liquidated damages. In the solution of this problem the courts have evolved certain guiding principles.

Where the parties, contemplating a breach of contract, the damages of which are difficult to ascertain, themselves calculate a reasonable amount as liquidated damages, the courts will uphold this amount as liquidated damages and not treat it as a penalty.[1] The parties are free to stipulate their own damages only so long as they remain reasonable and not exorbitant.[2] An essential element of liquidated damages is the intent of the parties. The damages specified must have been intended as liquidated damages [3] or the courts will hold it a penalty. This intent, however, is the legal intent obtained often by a forced construction, and frequently quite at variance with the real intent of the parties.[4] In their anxiety to relieve from the supposedly harsh measures of a penalty, the courts do not hesitate to exercise arbitrary methods of discovering the parties' in-

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[9] Western Union Tel. Co. *v.* Compton (Ark.), 169 S. W. 946.

[10] Western Union Tel. Co. *v.* Kansas, 216 U. S. 1; Herndon *v.* Chicago, etc., Ry. Co., 218 U. S. 135; Harrison *v.* St. Louis, etc., Ry. Co., 232 U. S. 318.

[11] Western Union Tel. Co. *v.* Compton, *supra;* Harrison *v.* St. Louis, etc., Ry. Co., *supra.*

[12] *Supra.*

[1] City of New Britain *v.* New Britain Tel. Co., 74 Conn. 326, 50 Atl. 881.

[2] Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253.

[3] Stratton *v.* Fike, 166 Ala. 203, 51 South. 874.

[4] Davis *v.* U. S. 17 Ct. Cl. 201.